Filed 8/9/10 In re D.A. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re D.A., a Person Coming Under the Juvenile Court Law.	
RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, Plaintiff and Respondent, v. V.A., Defendant and Appellant.	E050445 (Super.Ct.No. RIJ099662) OPINION

APPEAL from the Superior Court of Riverside County. Matthew C. Perantoni, Commissioner. Affirmed.

Leslie A. Barry, under appointment by the Court of Appeal, for Defendant and Appellant.

Pamela J. Walls, County Counsel, and Julie Koons Jarvi, Deputy County Counsel, for Plaintiff and Respondent.

No appearance for minor.

D.A. (minor) (born March 2009) came to the attention of the Riverside County Department of Social Services (the department) when mother tested positive for methamphetamines, marijuana, benzodiazepines, and opiates after giving birth to minor.[1] After removing minor from mother's custody, the court declined to offer mother reunification services due to the previous removal of four of mother's children under the same or similar circumstances. Prior to the date set for the Welfare and Institutions Code[2] section 366.26 hearing, mother filed a section 388 petition requesting reunification services. The juvenile court denied mother's request, found minor adoptable, and terminated mother's parental rights.

On appeal, mother contends the court erred in denying her section 388 petition and in finding minor adoptable. We affirm.

FACTUAL AND PROCEDURAL HISTORY

On March 27, 2009, the department received an immediate response referral after mother tested positive for several drugs after giving birth to minor. Although minor tested negative for drugs, she was admitted to the Neonatal Intensive Care Unit (NICU) for renal failure. Mother admitted using methamphetamine and marijuana during her pregnancy. Mother acknowledged using methamphetamine within a week of the birth.

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[1] The reporting party indicated that the positive results for benzodiazepines and opiates could have been the result of medications administered to mother during the Cesarean section procedure.

[2] All further statutory references are to the Welfare and Institutions Code otherwise indicated.

Mother reported a six- or seven-year habit of smoking methamphetamine three or four days a week.[3] She indicated that at one point she had been clean for two years, but started using again. Mother said that she quit using methamphetamine during her most recent pregnancy, but started again when she was seven months along.

Mother had four previous children removed from her custody due, at least in part, to her use of methamphetamine. One of her children had reportedly ingested methamphetamine and another tested positive for methamphetamine at birth. Mother's reunification services in each of those cases had been terminated due to her failure to complete services, including substance abuse treatment and parenting education.

The jurisdiction and disposition report filed on May 27, 2009, indicated that while in the neonatal intensive care unit (NICU), minor had been diagnosed with the following conditions: (1) asymmetric intrauterine growth restriction; (2) hypoglycemia; (3) presumed sepsis; (4) acute renal failure; (5) asphyxial related hepatic and renal injury; (6) electrolyte abnormalities; (7) suck-swallow discordination; (8) intrauterine drug exposure; and (9) anemia. Minor's kidneys were operating at only 50 percent of normal. Minor was discharged from the NICU on April 30, 2009.

An addendum report dated July 29, 2009, reflected that minor's kidney function had returned to 100 percent. However, it was now feared that minor might have Cerebral Palsy. Mother submitted to the court's jurisdiction, but contested the recommended

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[3] The initial removal of mother's first two children, based in part on her use of methamphetamine, occurred on August 9, 2000; thus indicating the mother's history of methamphetamine use was closer to at least nine years than the six to seven years she admitted in the instant case.

disposition. Nevertheless, the court removed minor; denied reunification services pursuant to section 361.5, subdivisions (b)(10), (11), and (13); and set a section 366.26 hearing.

In an addendum report dated November 19, 2009, the social worker observed that minor had been placed with the prospective adoptive parents on June 16, 2009. It was minor's third placement. Minor was medically fragile and developmentally delayed. Minor was being treated for gastroesphogeal reflux disease. The prospective adoptive parents reported observing minor having seizures. Minor was delayed in fine and gross motor skills. She was stiff and did not move her arms as would be age appropriate. Minor was also verbally delayed. However, by November 23, 2009, it was noted that most of minor's initial diagnoses while in the NICU had been resolved.

On December 23, 2009, mother submitted a section 388 petition on a JV-180 form. She requested reunification services based on her purported change of circumstances due to her continued sobriety, completion of a parenting class, and completion of a substance abuse treatment course. The juvenile court ordered a hearing finding that minor's best interests might be served by granting the petition.

At the combined sections 388 and 366.26 hearing on January 25, 2010, it was acknowledged that mother had most recently tested negative for drugs on December 22, 2009. Nevertheless, mother remained unemployed. The court found "that there is not a change of circumstances. The circumstances do appear that they could be changing, but certainly they have not changed."

DISCUSSION

A. SECTION 388 PETITION

Mother contends that her participation in a parenting course, attendance in a 12-step program, and eight-month period of sobriety constituted changed circumstances such that the juvenile court should have granted her petition and ordered reunification services. We disagree.

"The juvenile court may modify an order if a parent shows, by a preponderance of the evidence, changed circumstance or new evidence and that modification would promote the child's best interests. [Citations.] This is determined by the seriousness of the problem leading to the dependency and the reason for its continuation; the strength of the parent-child and child-caretaker bonds and the time the child has been in the system; and the nature of the change of circumstance, the ease by which it could be achieved, and the reason it did not occur sooner. [Citation.] After termination of services, the focus shifts from the parent's custodial interest to the child's need for permanency and stability. [Citation.] 'Whether a previously made order should be modified rests within the dependency court's discretion, and its determination will not be disturbed on appeal unless an abuse of discretion is clearly established.' [Citation.] The denial of a section 388 motion rarely merits reversal as an abuse of discretion. [Citation.]" (*In re Amber M.* (2002) 103 Cal.App.4th 681, 685-686 (*Amber M.*).)

Section 388 can provide "an 'escape mechanism' when parents complete a reformation in the short, final period after the termination of reunification services but before the actual termination of parental rights." (*In re Kimberly F.* (1997) 56

Cal.App.4th 519, 528.) "Even after the focus has shifted from reunification, the scheme provides a means for the court to address a legitimate change of circumstances while protecting the child's need for prompt resolution of his custody status." (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) However, the best interests of the child are of paramount consideration when a petition for modification is brought after termination of reunification services. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) Chronic substance abuse is generally considered a more serious problem and, therefore, is less likely to be satisfactorily ameliorated in the brief time between termination of services and the section 366.26 hearing. (*Kimberly F.*, at p. 531, fn. 9.)

In *Amber M.*, *supra*, 103 Cal.App.4th 681, one of the factors leading the appellate court to conclude that the juvenile court had not abused its discretion in denying mother's section 388 petition was that mother had a 17-year history of drug abuse, had relapsed twice previously, and had been clean for only 372 days. (*Amber M.*, at p. 686.) Likewise in *In re C.J.W.* (2007) 157 Cal.App.4th 1075, 1079, the court concluded that three months of sobriety was insufficient to show changed circumstances when evaluated with the parents' extensive history of drug abuse and failure to reunify with other children. (*C.J.W.*, at p. 1081.)

Here, the juvenile court did not abuse its discretion by denying mother's section 388 petition, when mother's history of long-term drug abuse and failure to reunify with previous children was weighed against her short-term efforts to remain clean. Mother, 29 years old during the pendency of the proceedings below, had variously stated that she had been using methamphetamine three or four times a week for as little as six to seven years,

to as much as 10 or more years. Mother had four of her other children removed for problems related to her methamphetamine use. Although offered services in those previous cases to ameliorate her substance abuse problems, mother failed to complete services in one case and to even participate in services in another. Mother herself asserted that she had ceased using drugs on two occasions—once for two years and once for several months during her most recent pregnancy. Nevertheless, mother went back to using methamphetamine both times. Mother never participated in any drug cessation courses after the termination of juvenile proceedings regarding her other four children.

Mother's earliest negative drug test in the current matter occurred on April 7, 2009. Her most recent negative drug test occurred on December 22, 2009. However, mother had not been consistently tested, showing negative test results only on the following additional dates: May 12, 2009, June 8, 2009, June 18, 2009, July 2, 2009, and September 24, 2009. Thus, mother had, at best, demonstrated only an eight- and one-half month documented period of sobriety. This pales in comparison with mother's previous two-year period of sobriety after which she returned to using. Moreover, it is just not substantial enough to constitute changed circumstances when weighed against her nine- to ten-year history of drug abuse and repeated failure to get clean.

Mother's citation to *In re Casey D.* (1999) 70 Cal.App.4th 38 avails her not. While the juvenile court there determined that father's nine-month period of sobriety amounted to a change in circumstances it, nevertheless, denied father's section 388 petition finding that it was not in the minor's best interest to be returned to father's care. The appellate court affirmed the denial of father's section 388 petition. (*Id.* at pp. 45,

49.) In no way did the juvenile or appellate court hold that a nine-month period of sobriety constitutes a per se change in circumstances. Whether to modify a previously made order rests within the dependency court's discretion. (*Amber M.*, *supra*, 103 Cal.App.4th at 685.) Here, the juvenile court determined that mother's, at best, eight- and one-half month period of sobriety did not constitute a change of circumstances when weighed in consideration with all the myriad of factors relevant in this particular case. In doing so, we cannot say that the juvenile court abused its discretion.

Furthermore, mother simply did not have a strong parent-child bond with minor. Minor was detained on the day of her birth. She was not released from the NICU for over a month; she was released directly to foster care. Thus, mother never had custody of minor and never provided any meaningful care for her. While mother initially had weekly one hour supervised visitation with minor, visitation was reduced to monthly one-hour visits when reunification services were denied. Mother was noted to spend much of her visitation discussing the case rather than actively parenting or interacting with minor. Mother failed to comprehend the seriousness of minor's medical difficulties and simply gave up feeding minor on one occasion because she could not understand the proper method of doing so. Mother once requested an extended visit, which was granted, but she failed to stay for the extended visit. The social worker concluded that minor was not bonded to mother.

The prospective adoptive parents, on the other hand, had custody of minor since June 16, 2009, over seven months at the time of the section 388 hearing. They had "extensive experience with special needs and medically fragile children." The social

worker opined that minor was clearly bonded to the prospective adoptive parents and looked to them for attention and nurturing. "[Minor] appears extremely comfortable in her home environment and very attached to her prospective adoptive parents. The prospective adoptive parents have reciprocated an attachment to [minor] and have formed a close bond with her."

The juvenile court did not abuse its discretion in determining that the best interest of minor would be better served by the permanency and stability proffered by the prospective adoptive home than the indeterminacy of offering mother reunification services. Indeed, as the social worker noted, "[minor] is a special needs child who require[s] follow-up appointments, stability and consistency in a loving and nurturing environment. The prognosis of returning [minor] home in the future is poor. The mother has had years of chronic drug substance abuse leading to the loss of four other children." Mother's continued unemployment and short-term rectification of the issues leading to detention were simply de minimis when considered in the context of minor's interest in long-term stability and permanence.

B. ADOPTABILITY

Mother contends that the juvenile court erred in determining that minor was adoptable due to the extreme nature of minor's physical and mental disabilities. We hold that substantial evidence supported the juvenile court's adoptability finding.

The juvenile court cannot terminate parental rights unless it finds by clear and convincing evidence "that it is likely the child will be adopted . . . ." (§ 366.26, subd. (c)(1).) "Review of a determination of adoptability is limited to whether those findings

are supported by substantial evidence. [Citation.]" (*In re Carl R.* (2005) 128 Cal.App.4th 1051, 1061.) "[W]e view the evidence in the light most favorable to the trial court's order, drawing every reasonable inference and resolving all conflicts in support of the judgment. [Citation.] An appellate court does not reweigh the evidence. [Citation.]" (*In re Marina S.* (2005) 132 Cal.App.4th 158, 165.)

"'The issue of adoptability . . . focuses on the minor, e.g., whether the minor's age, physical condition, and emotional state make it difficult to find a person willing to adopt the minor. [Citations.]' [Citation.]" (*In re Zeth S.* (2003) 31 Cal.4th 396, 406, quoting *In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649.) "'"Usually, the fact that a prospective adoptive parent has expressed interest in adopting the minor is evidence that the minor's age, physical condition, mental state, and other matters relating to the child are not likely to dissuade individuals from adopting the minor. In other words, a prospective adoptive parent's willingness to adopt generally indicates the minor is likely to be adopted within a reasonable time either by the prospective adoptive parent *or by some other family*."' [Citation.]" (*In re Gregory A.* (2005) 126 Cal.App.4th 1554, 1562.)

Here, substantial evidence supported the juvenile court's adoptability determination. As noted above, the prospective adoptive parents had custody of minor since June 16, 2009, over seven months at the time of the section 366.26 hearing. The couple had "extensive experience with special needs and medically fragile children." They "run a consulting business providing services to families of special needs children who are having difficulty accessing services, and they volunteer their time with foster

parents." One of the prospective adoptive parents is a stay-at-home parent with a teaching background.

The prospective adoptive parents were thoroughly conversant with minor's medical problems and needs. They kept a detailed "Journal of Care" regarding minor's various doctor's appointments and prescribed treatments. The social worker's service logs reflected the prospective adoptive parents' intimate knowledge of minor's problems. The prospective adoptive parents took minor to her frequent medical appointments and complied with the prescribed treatments.

The prospective adoptive parents consistently expressed a strong desire to adopt minor. "The prospective adoptive parents speak devotedly of [minor] and interact with her in a loving and compassionate way." "The prospective adoptive parents present as very responsible and mature adults who have stated their commitment to maintaining [minor] in their home as their adopted child." "They took placement of [minor] after seeing reports that she might have ongoing serious internal organ failure and might not ever be able to live independently. . . . [¶] . . . [¶] The prospective adoptive parents state that they understand the responsibilities of adoption and do not take the responsibility lightly." The prospective adoptive parents had previously adopted four other children and obviously understood the responsibilities inherent in the task.

Mother cites *In re Jerome D.* (2000) 84 Cal.App.4th 1200; *In re Amelia S.* (1991) 229 Cal.App.3d 1060; *In re Asia L.* (2003)107 Cal.App.4th 498; and *In re Brian P.* (2002) 99 Cal.App.4th 616 for the proposition that the prospective adoptive parents' willingness to adopt alone constituted insufficient evidence of adoptability. These cases

are distinguishable. In *Jerome D.*, the adoption assessment report did not state whether there were any *approved* families willing to adopt the child. (*Jerome D.*, at p. 1205.) The report also failed to mention that the child had a close relationship with his mother, and had a prosthetic eye that required special treatment. In addition, the report did not address the prospective adoptive parent's criminal and child abuse history. The court in *Jerome D.* concluded it was clear that the finding of adoptability was based only on the caretaker's willingness to adopt. Therefore, there was insufficient evidence of general adoptability to support the adoptability finding. (*Ibid.*)

In *Amelia S.* the appellate court reversed a finding of adoptability of a sibling set of nine out of ten children who had developmental, emotional, and physical problems. (*In re Amelia S.*, *supra*, 229 Cal.App.3d at pp. 1062-1063, 1065.) The children were described as "'hard to place.'" (*Id.* at p. 1063.) None of the foster parents had agreed to adopt them; although, the foster parents of five of the children were "*considering* adoption." (*Id.* at pp. 1062, 1065.) The remaining foster parents expressed no interest in adopting the remaining children. (*Id.* at pp. 1062-1063.) The appellate court thus concluded there was insufficient evidence of adoptability. (*Id.* at p. 1065.)

In *Asia L.* the children were observed to have extreme emotional and psychological problems requiring specialized placement. (*In re Asia L.*, *supra*, 107 Cal.App.4th at pp. 510-512.) A report initially noted that one of the children was considered "difficult to place" as there was no prospective adoptive parent identified for him. (*Id.* at p. 511.) A subsequent report observed that the foster parents were "'willing to explore adoption of the children, [but] it is too soon for [the foster parents] to make

such a permanent and life changing decision.'" Nevertheless, the department opined that a prospective adoptive family could be found for the children. (*Ibid*.) The appellate court concluded that "the foster parents' willingness to explore the option of adopting [the children was] too vague to be considered evidence that some family, if not this foster family, would be willing to adopt these children." (*Id*. at p. 512.) "[T]he social worker's conclusion alone is insufficient to support a finding of adoptability." (*Ibid*.)

In *Brian P.*, there was confusion over whether the department had even intended to characterize the child as adoptable prior to the section 366.26 hearing; in fact, counsel for the department expressly disagreed with the juvenile court's statement that the child had been determined to be adoptable. (*In re Brian P., supra,* 99 Cal.App.4th 616 at pp. 619-621.) The child's current foster mother was uninterested in adopting him. No other prospective adoptive home had been located. Indeed, the department initially intended to request a continuance so that a prospective adoptive home could be located. (*Id*. at pp. 619-621.) No adoption assessment report determining the child's likelihood of adoption had been prepared. (*Id*. at p. 624.) Due to developmental difficulties, the child had only recently learned to dress himself and was unable to speak with the social worker, communicating instead by facial expressions and gestures. (*Id*. at p. 625.) Nevertheless, the juvenile court found clear and convincing evidence the child was adoptable and terminated parents' parental rights. (*Id*. at p. 621.) The appellate court reversed, holding that insufficient evidence supported the juvenile court's determination of adoptability. (*Id*. at p. 625.)

Here, contrary to the cases discussed above, the prospective adoptive parents were approved adoptive parents who were thoroughly knowledgeable regarding the minor's medical problems and consistently indicated a strong, definitive desire to adopt him. "[I]n some cases a minor who ordinarily might be considered unadoptable due to age, poor physical health, physical disability, or emotional instability is nonetheless likely to be adopted because a prospective adoptive family has been identified as willing to adopt the child." (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1650.)

DISPOSITION

The judgment is affirmed.

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/s/ MILLER
J.

We concur:

/s/ RAMIREZ
Acting P. J.

/s/ HOLLENHORST
J.